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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 78-1201

MOBIL OIL CORPORATION,

Appellant,

vs.

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

APPEAL FROM
THE SUPREME COURT OF VERMONT

BRIEF AMICUS CURIAE ON BEHALF OF THE COUNTY OF LOS ANGELES

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INTEREST OF THIS AMICUS CURIAE

The Appellant herein has suggested that the Due Process Clause presents the taxation of a company's income on the basis of Norton Co. v. Department of Revenue, 340 U.S. 534 (1951), (involving a tax based upon actual sales to the state's customers). The Appellant also suggests that because it receives some income

from abroad, that income is totally immune from consideration as part of the corporate income for state tax purposes. The arguments proposed in support of these conclusions would have the effect, if accepted, of preventing any consideration of foreign related matters in levying state or local taxes. The Appellant's arguments would cause large pleasure yachts owned by California residents, chartered to California residents, but stopping for 2 days in Vancouver, to escape California taxation because of the "power" of Canadian officials to levy taxes there. This would be true even though no tax had been levied or was contemplated in Canada.1/

Because of the novelty of the Appellant's approach, no estimate of revenue loss caused by this Court's acceptance of its theories can be made. But the loss of property tax income as a result of accepting Appellant's commerce clause arguments would be at least in the tens of millions of dollars per year in Los Angeles County alone.

1/ A similar state of facts is now being presented to the California Superior Court in White Cloud Charter Boat Co. v. County, L.A. Superior Ct. No. C264361. A taxpayer organized a corporation which charters principally to the taxpayer himself and which touches at foreign ports. The plaintiff utilizes the Appellant's arguments concerning the Commerce Clause in an attempt to avoid even apportioned taxation in California.

ARGUMENT

I

THE DUE PROCESS CLAUSE ARGUMENT PROPOSED BY APPELLANT FAILS TO ACCOUNT FOR THE DIFFERENCE IN TAXES.

The Appellant utilizes a case involving a sales-based tax and applies it to income taxes imposed by the Appellee (Norton Co. v. Department of Revenue, supra).

The Appellant suggests that a general-purpose tax, i.e., the income tax, should be subject to a rule that excludes from its ambit any transaction not related to the taxing jurisdiction.

But the argument misses the mark in that the apportionment itself narrows the taxable profits to those related to the jurisdiction.2/

2/ Appellant seeks to use this same "divide and conquer" approach to Moorman Manuf. Co. v. Bair, 437 U.S. 267 (1978). Appellant states that the power to tax must be separated from the power to apportion. But in reality, apportionment is one of many devices to prevent the states

(cont. p. 4)

In the sales-based tax arena the taxpayer would be required to show that the sales it seeks to avoid being taxed had no connection with the taxing jurisdiction (Norton Co. v. Department of Revenue, supra at p. 537).

The income tax, however, is not based upon any narrow effect upon the taxing jurisdiction, nor is it used for narrow tax-related purposes. It is based upon the effect of the business' presence upon the total economy of the taxing jurisdiction. As a result, an attempt to classify it in the same way as a tax based upon particular transactions, or upon the mere presence of property, does not comport with the nature of the tax in any way.

2/ (cont.)

from taxing that which they have no power to tax. Tax Credits and other devices are all actually part of the States' efforts to impose taxes only that "part" of a company having a connection with the jurisdiction. Apportioning company profits is part of the determination of a State's power to tax and cannot be separated from it.

In fact, if the Appellant's argument in this regard is accepted, it would be logical for a Court to consider the Due Process approach assuming that apportionment had been carried out so as to correctly reflect the taxpayer's presence in the jurisdiction. In fact, Appellant does not appear to dispute this.

Such comparisons result only in double deductions, requiring a State to apportion income so as to levy the tax only on that portion of income logically related to the jurisdiction, and also to break out and deduct some (or all) out-of-state activities, even though they were already apportioned. The Appellant has failed to consider the difference between a tax on some thing or transaction and one based upon the company's income, logically apportioned to the particular State.

The Appellant has also failed to show that the apportionment was not proper or accurate.

II
THE APPELLANT'S COMMERCE CLAUSE ARGUMENTS FAIL TO CONSIDER THE NATURE OF THE TAX AND THE NATURE OF THE COMMERCE CARRIED ON.

The Appellant suggests that, since some of its income is received from companies operating in other countries, such income should be immune from any taxation by the States.

The Appellant supports this suggestion with the theory that this Court's requirements for property taxes directly on instrumentality of commerce (which were not shown to have any broad impact on the State) should be applied in addition to apportionment concepts. (See Japan

Lines Ltd. v. County of Los Angeles, ___ U.S. ___, 47 U.S.L.W. 4477 (April 30, 1979)). This "per se" approach would simply immunize every dollar of income, every piece of property, and every sale having any contact with a foreign taxing jurisdiction.

The Appellant suggests that because a foreign nation could possibly impose a tax which would be contrary to every civilized nation's concept of fairness and propriety, all state taxes on a company touching those foreign nations are unconstitutional

This new approach to state taxation of multi-national companies is a new one, indeed, and should be examined carefully before being applied to taxes and situations which are not relevant.

Here, for instance, the Appellant seeks to immunize income from foreign countries simply because it came from foreign countries. There is no showing here that that income was not used or spent (or could not be used or spent) in Vermont. There is no showing that the income was not used or spent in another state rather than Vermont. And there is no showing that, if operation in Vermont reflected a temporary loss, the income would not be used to render support there.

The income tax is not based on the temporary presence of instrumentalities which are constantly in transit. Nor is it based upon a

single transaction having virtually no impact on the economy of a state. It is based upon the more or less pervasive impact of a company's activities in the jurisdiction. The idea that such a tax, (given that impact), is subject to the same rules as other taxes, simply ignores the nature of the tax and the fact that apportionment has been correctly carried out.[3/]

In reality, the Appellant seeks to apply tests meant to protect foreign enterprises only temporarily in a State (and whose instrumentalities are constantly in transit), from the problem involved in taxes which have been subject to varying court opinions (see e.g., Hays v. Pacific Mail SS Line, 58 U.S. 546 (1855) and Sea-Land Services Inc. v. County of Alameda, 12 Cal. 3d 772, 117 Cal.Rptr. 448 (1974)). Appellant seeks to apply those tests to a domestic company, permanently impacting on the total economy of a state in a variety of ways. The tests suggested by the Appellant are simply inapplicable and would have the effect of wholesale immunization

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3/ In Japan Lines Ltd. v. County, supra, the foreign carrier attacked the apportionment method itself, as applied to in transit instrumentalities, which had only the most indirect impact on the economy of the State. Here, the Appellant does not attack the apportionment method, and one would assume that the apportionment correctly measures the "amount" of the company which is "in" the State of Vermont.

of income from state taxation even though the income was used to directly or indirectly support in-state operations.

CONCLUSION

The Appellant has attempted to:

1. Impose sales tax logic on income taxes;

2. Impose in-transit-property-tax logic on permanent establishments;[4/]

3. Impose rules relating to foreign-based companies on U.S.-based companies; and to

4. Impose all possible foreign tax systems on the tax systems of the States of the United States.

4/ One is obliged to ask whether the fact that a foreign country can impose a property tax on a building in this country belonging to a foreign bank, prevents a locality from taxing such a building. Appellant would, apparently answer in the affirmative.

No such attempts are supported by the United States Constitution or even the most far-fetched emotions of accomodation to our foreign trading partners.

Respectfully submitted,

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